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IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE THE AUTHORS GUILD, INC., JACQUES BARZUN, JAMES GLEICK, JUSTIN KAPLAN, TRACY KIDDER, NICHOLAS LEMANN, JOHN LUKACS, ROBERT K. MASSIE, JACK MILES, AND JEAN STROUSE, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Interest of Amici Curiae	1
STATEMENT	7
Introduction and Summary of Argument	8
ARGUMENT	9
I. THE OPINION BELOW PROPERLY WEIGHED THE INTERESTS OF AUTHORS, PUBLISHERS, RESEARCHERS AND ELECTRONIC DATABASES	9
II. THE DECISION BELOW PROPERLY ANALYZED THE STATUTORY LANGUAGE OF SECTION 201(C)	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES

Page

American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929, (2d Cir. 1994) 17

Campbell v. Acuff-Rose, 510 U.S. 569 (1994) 11

Geisel v. Poynter Products, Inc., 295 F.Supp. 331 (S.D.N.Y. 1968) 19

Ryan v. Carl Corp., 23 F.Supp.2d 1146 (N.D. Cal. 1998) 17

Sony Corporation v. Universal City Studios, 464 U.S. 417 (1984) 10

FEDERAL STATUTES

17 U.S.C. § 106 14

17 U.S.C. § 114 14

17 U.S.C. § 201(c) ..... passim

H.R. Rep. No 94-1576, at 122-123, reprinted in U.S.C.A.A.N. 5659, 5738 ..... 19, 20

MISCELLANEOUS

3 *Boswell's Life of Johnson* 19

Deidre Carmody, "Harpers Shares Electronic Profits with Authors," *The New York Times*, Feb. 2, 1996 14

Anna Couey, "Authors Rights: On getting Paid in the Age of Digital Reprodution," *Microtimes*, Sept. 16, 1996. 14

Ross Kerber, "Atlantic Monthly Agrees to Settle Action Over Electronic Publishing," *The Wall Street Journal*, March 29, 1996 14

McNees, "Fair Use Come the Revolution," *Authors Guild Bulletin*, Winter 1995 16

3 *Nimmer on Copyright* § 10.01[C][2] 20

Maureen O'Brien, "Authors Organize to Launch Electronic Rights Service," *Publishers' Weekly*, June 5, 1995 15

BRIEF OF AMICI THE AUTHORS GUILD, INC., JACQUES BARZUN, JAMES GLEICK, JUSTIN KAPLAN, TRACY KIDDER, NICHOLAS LEMANN, JOHN LUKACS, ROBERT K. MASSIE, JACK MILES and JEAN STROUSE

This brief *amici curiae* is submitted in support of Respondents Jonathan Tasini *et al.* By letters filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief. [1]

INTEREST OF AMICUS CURIAE

The Authors Guild, Inc. founded in 1912, is a national non-profit association of more than 8,200 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. Almost 40% of its membership identifies itself primarily as journalists, most of them freelance contributors. Guild members have received many accolades and awards in the world of publishing, including numerous Pulitzer and Nobel Prizes.

The Authors Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression and taxation. In the area of copyright, the Guild has fought to procure

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[1] As required by Rule 37.6 of this Court, *amici curiae* submit the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

satisfactory domestic and international copyright protection and to secure fair payment of royalties, license fees and non-monetary compensation for authors' work. Guild attorneys annually help hundreds of authors negotiate and enforce their publishing contracts.

Authors Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field. Fees to Guild members for re-sale and re-use of their work provide a substantial portion of their income.

Jacques Barzun is a world-renowned historian, literary commentator, translator and educator. His career spans more than sixty years, some thirty books of musical, literary, philosophical, political and art history and criticism, and countless awards and honors. His widely varied historical books include *A Stroll with William James* (biography); *The American University: How it Runs, Where it is Going*; *Lincoln the Literary Genius*; and *Darwin, Marx, Wagner: Critique of a Heritage*. His most recent work, *From Dawn to Decadence: 500 Years of Western Cultural Life, 1500 to Present*, has been nominated for this year's National Book Award for nonfiction and the National Book Critics Circle Award for criticism. He has contributed many articles to scholarly periodicals as well as to Harper's, Atlantic, The New York Times, New Republic, Saturday Review, and others. Mr. Barzun is a member of the American Historical Association, the American Academy and Institute of Arts and Letters (past president), and the Royal Society of Arts. He was dean of graduate faculties and provost at Columbia University and for many years the University Professor of History. Mr. Barzun has been

awarded the George Polk Memorial Award and the Chevalier de la Legion d'Honneur in honor of his contributions to our historical store of knowledge.

James Gleick is an award-winning journalist, biographer, teacher and technologist. His books include *Genius: The Life and Science of Richard Feynman,* and *Chaos: Making a New Science*, both of which were finalists for the National Book Award and the Pulitzer Prize. Mr. Gleick's most recent book is the best-selling *Faster: The Acceleration of Just About Everything.* He was a founding editor of Metropolis, a Minneapolis-based weekly newspaper. For ten years he worked for the New York Times, both as a reporter and an editor. He continues to be a regular contributor to the Times and the New York Times Magazine. In 1993 he co-founded the Pipeline, a New York City based Internet service. Mr. Gleick's subject matter comprises leading edge scientific research, the social and economic ramifications of technology and the history of groundbreaking innovations.

Justin Kaplan is a historian, literary critic and award-winning biographer. Mr. Kaplan is author of several biographies including *Mr. Clemens and Mark Twain*, which won both the Pulitzer Prize and the National Book Award for biography, and *Walt Whitman: A Life*, winner of the American Book Award for biography. He has authored widely acclaimed biographies of Charlie Chaplin and Lincoln Steffens. Mr. Kaplan is renowned for his skill at confronting the obscured conceptions of historical figures and resolving their mysterious elements. A former Guggenheim fellow and lecturer at Harvard University, Mr. Kaplan is a member of the American Academy of Arts and Sciences and of the Society of American Historians.

Tracy Kidder is a highly acclaimed author of books and articles. Over the course of a 26-year professional career he has written six books and many magazine articles. He has been a contributing editor to the Atlantic Monthly since 1982. His books are The Soul of a New Machine, House, Among School Children, Old Friends, and Home Town. In 1982 Mr. Kidder won both the Pulitzer and the American Book Award for The Soul of a New Machine. He received a Christopher award, a National Book Critics Circle Award nomination, the Robert F. Kennedy Award and Ambassador Book award for Among Schoolchildren. Mr. Kidder was the recipient of The New England Book Award in 1994 for Old Friends. Mr. Kidder is renowned for his ability to write engagingly on subject matters as diverse as elementary education, computer engineering, nursing homes and home construction. By combining meticulous archival research, personal interviews and observation with a keen writing ability, Mr. Kidder has made otherwise arcane subject matters both accessible and fascinating to the general reading public.

Nicholas Lemann is a contributing editor to The New Yorker. He has been a journalist for The Washington Monthly, Texas Monthly, The Washington Post and The Atlantic Monthly, where he was national correspondent. His work appears often in such other publications as The New York Review of Books, The New York Times Magazine, and The New Republic. He is the author of four books, including, most recently, *The Big Test: The Secret History of American Meritocracy;* as well as *The Promised Land*, a history of African-American migration to large urban centers in the north and of the War on Poverty, for which he was awarded the Los Angeles Times Book Award for History

John Lukacs is an historian, author and emeritus professor of History at Chestnut Hill College in Philadelphia. He has served on the faculties of Columbia University, Johns Hopkins School of Advanced International Studies, University of Pennsylvania and the Fletcher School of Law and Diplomacy. Professor Lukacs is widely admired for his approach to subjects ranging from historical figures of WWII to American democracy itself. A prolific writer, Professor Lukacs's critically acclaimed books include *1945: Year Zero; A History of the Cold War; Out growing Democracy: A History of the United States in the Twentieth Century*; *The Hitler of History; A Thread of Years*; and *The Edge of the Twentieth Century: And the End of the Modern Age*, which earned Professor Lukacs a nomination for the Pulitzer prize.

Robert K. Massie was a journalist for Collier's, Newsweek magazine, the Saturday Evening Post and other news organizations for several years before publishing his acclaimed biography *Nicholas and Alexandra,* widely considered the definite historical study of the last Czar of Russia. He went on to co-author *Journey*, which won the Christopher Award; *Dreadnought: Britain, Germany and the Coming of the Great War*; *The Romanovs: The Final Chapter;* and *Loosing the Bonds: The United States and South Africa in the Apartheid Years.* His *Peter the Great: His Life and World* won the Pulitzer Prize for Biography, an American Library Association Notable Book citation and was nominated for the American Book Award. *Nicholas and Alexan*dra and *Peter the Great* were adapted for motion picture and for television, respectively. A former Rhodes scholar, Mr. Massie has been the Ferris Professor of Journalism at Princeton University, and the Andrew Mellon Professor of Humanities at Tulane. Mr. Massie

was president of the Authors Guild from 1987 to 1991, and is an ex-officio member of the Authors Guild Council.

Jack Miles is the director of the Humanities Center at the Claremont Graduate School in California. In 1991 he received a Guggenheim Fellowship to write *God: A Biography,* for which he received the Pulitzer Prize for biography in 1996. Immediately prior to accepting his post at the Claremont Graduate School Mr. Miles was a book columnist and editorial board member of the Los Angels Times. He has been an editor at three major academic and trade publishers: the University of California Press, Doubleday and Scholar's Press. Mr. Miles was a Jesuit Seminarian at Pontifical Gregorian University in Rome in the 1960's. He taught in the theology department of Loyola University. On its publication *God* was praised for its innovative approach to the history of monotheism and for the surety with which Mr. Miles brought that approach to its goal of understanding the way western conceptions of God evolved.

Jean Strouse is an award-winning biographer, historian, journalist, and editor. Her books include *Morgan: An American Financier* and *Alice James: A Biography. Morgan* was nominated for the National Book Award. *Alice James* garnered the Bancroft Prize in American History. Ms. Strouse has received fellowships from the Guggenheim Foundation, The National Endowment for the Arts, The National Endowment for the Humanities, the Radcliff Institute and the Gilder Lehrman Institute for American History. She has lectured at the Library of Congress, the Organization of American Historians in addition to numerous universities. She has been a consultant to the Library of American Lives and a

juror for the Pulitzer Prize. Ms. Strouse is a trustee for the John Simon Guggenheim Memorial Foundation and a member of the Guggenheim Foundation's Educational Advisory Board. Her work has appeared in numerous magazines and journals, including The New York Review of Books and Newsweek. She has been lauded for her intensive research and the clarity of her prose. Ms. Strouse is the incoming president of the Society of American Historians.

The *Amici* believe that it is extremely important for authors to control the use and disposition of their works and for them to share in the economic benefits derived from use of their works. They, too, use electronic databases to research issues relevant to their work and wish to have maximum access to this information resource. But rather than allowing Petitioners the unfettered ability to reuse and resell their work without prior permission or additional compensation, they believe that the solution to the problem presented by this case is to permit authors to share in the economic rewards of their creative work product. As noted below, there are efficient ways of insuring that a fair division of proceeds is made between authors, publishers and databases to achieve this goal. For these reasons, they submit this brief *Amici curiae*.

STATEMENT

Amici adopt the statement of the case contained in the brief of Respondents.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today most publishers procure express licenses from their contributors for electronic use. [2] The *amici curiae* (hereinafter, the "Authors") agree with Respondents that the plain language and the legislative history of Subsection 201(c) of the Act prove Petitioners wrong in their arguments to this Court. Indeed, the purpose of Section 201 (c) was to "clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions" by freelance authors, namely by limiting the rights granted to a publisher to "reproducing" (not displaying) their works within a very narrow range, as we show in Point II.

The Authors believe that payment of a fair portion of secondary use fees to writers need not obstruct free access to their contributions to the historical archive, any more than or any differently than does the payment to the publishers and databases. The database Petitioners and most other electronic databases already charge fees to researchers for electronic or physical access to archived materials they control. Sharing these fees with the authors of the material could be accomplished in various ways, as described below, without proscribing access to the material.

On the other hand, permitting unauthorized, uncompensated electronic re-uses will have an adverse effect on freelancers' economic interests, which should be

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[2] Indeed, Petitioner *The New York Times* began issuing written contracts to its freelancers in 1996. *Tasini et al. v. New York Times, et al.*, 206 F.3d 161, 164, n.1 (1999).

of paramount concern to those who wish to protect the integrity of historical archives. Depriving authors of a share of the income from electronic re-uses by NEXIS and UMI would directly and substantially upset the Copyright Act's careful balance between encouraging the dissemination of knowledge and granting the market incentives needed to maintain a healthy store of knowledge.

Secondary use rights, which Congress clearly intended to allow authors to retain separately from first publication rights, are of crucial value to authors. We urge the Court to reject Petitioners' attempt to distort the statute in order to deprive authors of such valuable rights.

ARGUMENT

POINT I

THE OPINION BELOW PROPERLY WEIGHED THE INTERESTS OF AUTHORS, PUBLISHERS, RESEARCHERS AND ELECTRONIC DATABASES

One of the Amicus briefs supporting Petitioners here advances the argument that the decision of the Second Circuit will "decreas[e] access to convenient, cost-efficient . . . information resources," and a decision in Respondents' favor will undermine important benefits to "historians and scholars." (See Brief Amici of Ken Burns *et al.* at 5-6).

Thousands of Authors Guild members and the individual *amici* here are themselves historians, biographers and researchers, who have a strong interest in having efficient access to "cost-efficient . . . information

services." They certainly use libraries, electronic databases and other internet sites in the course of their research. They do not believe that easy access to information resources is incompatible with insuring that authors obtain a fair return for their labors.

The solution to this problem is to require that publishers obtain prior express permission to make electronic uses of their authors' work and to arrange for authors to share in any income from inclusion of their materials in these databases. It is certainly not true that the articles and other writings will not find their way into NEXIS or other electronic libraries if the original publishers of the collective work obtain all the economic rewards from transmission to those libraries.

As the Court below noted, the newspapers or periodicals that publish the articles could easily amend their contracts with contributors to obtain the necessary rights and to pay authors their fair share as the *New York Times* has done. See 206 F.3d 161, 164, fn. 1 (2d Cir. 1999).

It is well-established that the purpose of the Copyright Clause is to encourage creative efforts by authors, for the benefit of society, by awarding them a fair economic return for their efforts. In *Sony Corporation v. Universal City Studios*, 464 U.S. 417, 429 (1984), this Court noted:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of

> authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

The idea that authors write, in part, for the economic rewards associated with such effort, is not new. This Court quoted from Samuel Johnson's famous aphorism, "'[n]o man but a blockhead ever wrote, except for money.'" 3 *Boswell's Life of Johnson* 19 (G. Hill ed. 1934). *Campbell v. Acuff-Rose*, 510 U.S. 569, 584 (1994).

The only problem in this situation is that for a short period of time, the *New York Times* and other newspapers or magazines did not take the necessary steps to insure that they did, in fact, control electronic rights to the articles they published and heedlessly licensed authors' works to electronic databases. Since the Copyright Law has a three-year statute of limitations, the "danger" faced by NEXIS or the *Times* in facing claims made by authors is not an insurmountable one.

The Burns *amici* further claim that:

> The threat of a tidal wave of lawsuits brought by freelance authors relying on such a holding will force publishers to minimize the risk of liability by prophylactically eviscerating electronic collections of significant materials. From the perspective of amici, the potential damage wrought by this rule is inestimable because such "freelance" materials include, among other things, Op-Ed pieces, letters to the editor, and other invaluable contemporary commentary on the people and events of a given point in time. Brief Amici of Ken Burns et al. at 12.

The Burns brief also alleges that it may be impossible to locate all the original authors. If they were found, they might demand an exorbitant price for use of their work.

> [E]ven assuming the respective rights holder(s) can be located, in addition to the practical and administrative burdens associated with attempting to clear rights retroactively, the aggregate costs of paying individual rights holders for the necessary permissions to republish their respective contributions in electronic form either will be passed on to individual and institutional end users, or may simply be prohibitive, particularly for the publishers of small and/or specialized academic journals. *Id.*

Finally, they assert that even prospectively, authors may make unreasonable demands for use of their work. "[I] is equally possible that freelance authors may deny granting such permissions, preferring instead that their individual works not be included in electronic archives regardless of the fees offered by the publisher." *Id.* at 13.

This parade of horribles is demonstrably flawed. First, the argument amounts to a claim that having usurped the authors' rights (by conveying electronic rights to NEXIS and UMI without owning such rights), the publishers cannot undo or pay for what they had improperly taken. Such an argument is hardly persuasive.

In the analogous area of the use of music on the internet, the Ninth Circuit recently affirmed the grant of a preliminary injunction against Napster, involving a

similar claim that the composers of music used on the internet are not entitled to share in the proceeds from use of their material in that medium. The *New York Times* itself rejected such an argument in a recent editorial:

> The decision is a major victory for the music record industry, and more broadly, for all creators of original material. The Internet is a revolutionary medium whose long-term benefits we are only beginning to fathom. *But that is no reason to allow it to become a duty-free zone where people can plunder the intellectual property of others without paying for it.* That would ultimately stifle, rather than encourage, creativity. Reconciling long-established law to new technologies is never easy, but the recognition of an author's ownership in an original creative work is one of our legal system's core principles.

New York Times, February 14, 2001 at A30. (emphasis added)

Second, it is certainly not true that the most likely remedy to be ordered by the lower court on remand is an injunction requiring the deletion from Petitioners' databases of all contributions where express electronic rights were not granted. In a letter to Representative James McGovern, the Register of Copyrights, Marybeth Peters, commented that such a remedy may not be sought or required. "[T]he *Tasini* case should be about how the authors should be compensated for the publishers' unauthorized use of their works, and not about whether the publishers must withdraw those works from their databases." Letter dated February 14, 2001, 147 *Cong. Rec.* E182-183 (February 14, 2001).

Third, as noted above, the idea that authors should decide, based on their own view of their economic interests, whether to grant certain rights or not is one which the Copyright Law endorses and protects. *See* 17 U.S.C. § 106. The notion that this principle should be applied to every area but electronic database rights is unacceptable. [3]

Publishers can license any part of an authors' copyrights in myriad ways, and they do; increasingly some publishers are paying authors separately for electronic rights. *See* Deidre Carmody, "Harpers Shares Electronic Profits with Authors," *The New York Times*, Feb. 2, 1996 at B14 (describing establishment of Author's Registry to solve problem of "publishers' resistance to the amount of bookkeeping involved in determining and sending out payments" for electronic re-use of freelance pieces); Ross Kerber, "Atlantic Monthly Agrees to Settle Action Over Electronic Publishing," *The Wall Street Journal*, March 29, 1996 (citing agreement to pay individual authors for electronic re-use). Individual negotiations with freelancers occur for every freelance article assigned and published. Anna Couey, "Authors Rights: On getting Paid in the Age of Digital Reprodution," *Microtimes*, Sept. 16, 1996.

Fourth, with respect to past uses, there are a variety of methods which would allow electronic databases to continue to retain and use earlier material while affording a reasonable economic return to authors.

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[3] It is true that certain sections of the Copyright Law provide for compulsory licenses, *see e.g.* 17 U.S.C. § 114 (compulsory mechanical license for music). But even there, the copyright owner does obtain appropriate compensation.

For example, in May 1995 the Authors Guild and other writers groups formed the Authors Registry, Inc., (the "Registry") to assist authors of all genres in collecting royalties for the distribution of their work through photocopying, electronic transmission and other means. Already, more than thirty writers' organizations (virtually every major group, including the Authors Guild, American Society of Journalists and Authors, PEN American Center, the National Association of Science Writers, Washington Independent Writers, and the National Book Critics Circle) and 95 literary agencies have agreed to register their members and clients with the Registry's central database. At present, the Registry's database contains more than 30,000 professional authors. Maureen O'Brien, "Authors Organize to Launch Electronic Rights Service," *Publishers' Weekly*, June 5, 1995 at 10.

Author-founders of the Registry were Robert A. Caro, E. L. Doctorow, Betty Friedan, James Gleick, George J.W. Goodman ("Adam Smith"), Gael Greene, Garrison Keillor, James A. Michener, Letty Cottin Pogrebin, Anna Quindlen, and Scott Turow. *Publishers Weekly*, *id.* Each of these authors has published both books and numerous freelance pieces in periodicals, including those of Petitioners.

Since freelance authors' livelihoods depend substantially on the collection of proceeds from subsidiary uses of their work after first publication, the Registry seeks to prevent unauthorized secondary usage, including electronic transmission, which both deprives authors of a crucial source of secondary income and

damages the entire market for the authors' work.[4] Informed authors overwhelmingly believe that sharing secondary use license fees with their print publishers is the only fair and efficient way to determine an article's secondary market value. The Authors Registry was designed to allow publishers, particularly newspaper and magazine publishers, to share their income for secondary use licenses equitably with their contributors. [5]

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[4] The Register of Copyrights, Marybeth Peters, confirms the importance of this secondary market. "[T]he interpretation of §201(c) advanced by publishers in *Tasini* would give them the right to exploit an article on a global scale immediately following its initial publication, and to continue to exploit it indefinitely. Such a result is beyond the scope of the statutory language and was never intended because, in a digital networked environment, it interferes with authors' ability to exploit secondary markets. Acceptance of this interpretation would lead to a significant risk that authors will not be fairly compensated as envisioned by the compromises reached in the 1976 Act. The result would be an unintended windfall for publishers of collective works." 147 Cong. Rec. E182-183 (February 14, 2001)

[5] In the closely related context of negotiating fair use guidelines with libraries for electronic media uses at the Conference on Fair Use sponsored by the White House, the publishers' representative acknowledged the absolute necessity and eminent practicality of negotiating for electronic access to copyrighted works: "I'm not saying 'Don't use it.' But negotiate for that use." McNees, "Fair Use Come the Revolution," *Authors Guild Bulletin*, Winter 1995 (quoting Jon Baumgarten, Association of American Publishers representative). In the same way these same publishers calculate their

To date, the Registry has distributed over $1,400,000 to authors for such secondary uses of their work. See Registry News at www.authorsregistry.org. These license fees have come from four American magazines (Harper's, Travel & Leisure, Food & Wine, and Cooking Light,) for CD-Rom and electronic and print re-uses, and from the Authors' Licensing & Collecting Society ("ALCS") of the United Kingdom to distribute payments to U.S. authors for secondary re-uses. *Id.*

Like the performing rights societies, American Society of Composers, Artists and Performers (ASCAP) and BMI, and the Copyright Clearance Center, see *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 929, (2d Cir. 1994) and other collectives, the Registry will act as a non-exclusive licensor of author-controlled rights.

There are still other legal methods for recovering for past misuses of material. A class action lawsuit, *Ryan v. Carl Corporation*, 97-3873-DLJ (N.D. Calif.), illustrates one of several ways in which Petitioners can respect their freelancers' copyright while at the same time completely avoiding the wholesale evisceration of the databases. *Ryan* was brought by several authors charging copyright infringement against Carl Corporation's "UnCover," a large, Web-based document delivery service. *Ryan v. Carl Corp.*, 23 F.Supp.2d 1146, 1155 (N.D. Calif. 1998). A class of authors, whose works were

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proceeds from the licenses they purported to grant the database Petitioners, whether based on a royalty formula or a flat fee, they could remit compensation to their contributors.

exploited by Carl and who had retained their secondary use rights to their works, was certified, and the parties ultimately reached a settlement. See Ryan, Settlement Agreement and Release, available at www.UnCoversettlement.com. A website was created which allowed authors to search for their names and determine whether any of their works were among the infringed works covered by the settlement. Pursuant to the Settlement Agreement and Release, the class of authors of infringed works was able to file their claims via the website.

The *Ryan* plaintiffs used the Authors Registry to match its database of authors' names against the settlement database. Registry News, at www.authorsregistry.org The Registry contacted the authors appearing in both databases to alert them to the settlement and claim procedures. A total of 9,190 notices were sent to potential class members using this method. The Court's Order of Dismissal entered November 13, 2000, released the Carl defendants from all claims related to the class's complaints of infringement. See www.UnCoversettlement.com. Yet the company is still able to continue to operate its document delivery service.

Indeed, class action lawsuits perform the salutary function of obtaining relief beneficial to the injured class members while at the same time providing a class-wide release from those claims to the defendants. *See, e.g., Authors Guild, et al. v. Dialog, et al,* 00 Civ. 6049 (S.D.N.Y.). In fact, plaintiffs in the Authors Guild case are in the process of negotiating a global settlement on behalf of the class with one of the defendants.

POINT II

THE DECISION BELOW PROPERLY ANALYZED THE STATUTORY LANGUAGE OF SECTION 201(C)

Amici strongly believe the Second Circuit correctly analyzed the provisions of Section 201(c). That section reads in part:

> In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

The Court below made reference to the statutory history of that provision, contained in the House Report on the Copyright Act of 1976, the definitive explanation of the law. H.R. Rep. No 94-1576, at 122-123, reprinted in U.S.C.A.A.N. 5659, 5738. That report noted that the above provision was meant to "clarify and improve the present confused and *frequently unfair legal situation* with respect to rights in contributions." *Id.* at 122 (emphasis added).

The "unfair[ness]" referred to covered situations where an author may have contributed an article (or piece of artwork) to a magazine without any contract specifying the scope of rights conveyed. In *Geisel v. Poynter Products, Inc.*, 295 F.Supp. 331 (S.D.N.Y. 1968), the

district court held that, based upon industry practice of the time, without an explicit reservation of rights by the author or creator, the magazine publisher "acquired from the author all beneficial as well as legal rights in every medium," 3 *Nimmer on Copyright* § 10.01[C][2] at 10-15.

Thus the new provisions of Section 201(c) can be read as greatly restricting the scope of rights acquired from an author making a contribution to a magazine, newspaper or other collective work, in the absence of a specific written agreement. That is, the law "clarif[ies]" and "improv[es]" the "unfair legal situation" confronting authors. It limits the scope of rights acquired by the publisher to three specific categories if a contract defining the specific rights granted is not signed by the author: (1) the right to use the article or other contribution in that particular edition; (2) the right to use the article in any "revision of that collective work"; and (3) a "later collective work in the same series."

The House Report makes reference to the permissible uses that fall within the statutory language.

> Under the language of this clause, a publishing company could reprint a contribution from one issue in a later issue of its magazine ["later collective work in the same series"], and could reprint an article from the 1980 edition of the encyclopedia in a 1990 revision of it ["any revision of that collective work"]; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work. H.R. Rep. No 94-1576, at 122-123, reprinted in U.S.C.A.A.N. 5659, 5738.

Thus the *New York Times* might be able to reprint an earlier op-ed article in a later edition of the newspaper, if no contract had been entered into with its contributor. But the newspaper could not include the article in a book anthology of "The Best Op-ed Articles from *The New York Times*" since such a collection would be a "new anthology" or an "other collective work."

The question in this case is whether the NEXIS database to which all of the *New York Times* articles are conveyed by the newspaper as well as millions of other articles can be considered a "later revision of that collective work" or does it more logically fall into the prohibited categories described in the House Report: namely "a new anthology or an entirely different magazine or other collective work."

It certainly seems clear that the NEXIS database should be considered "a new anthology" or a "new . . . collective work" for the reasons stated by the Court below. "NEXIS is a database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals. It can hardly be deemed a 'revision' of each edition of every periodical that it contains." 206 F.3d at 168.

There is a vast difference between a single edition of a newspaper or magazine and the NEXIS database, which incorporates material from so many different sources. Under Petitioner's theory, whenever an author's material can be found in a larger corpus of material, it constitutes a "revision" of the original article. Such a conclusion would totally undermine the limited scope of rights granted under Section 201(c) which Congress was so careful to draw.

CONCLUSION

For the reasons stated above, *amici curiae* request that the decision below be affirmed.

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